

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY - TRENTON

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MUTUAL PHARMACEUTICAL :  
COMPANY, INC., et. al., :  
 :  
Plaintiff, : DOCKET NO. CU-09-5421  
 :  
vs. : TRENTON, NJ  
 :  
WATSON PHARMACEUTICALS, : July 14, 2010  
INC., et. al., :  
 :  
Defendant. :  
 :  
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TRANSCRIPT OF CONFERENCE CALL HEARD BEFORE  
HONORABLE TONIANNE J. BONGIOVANNI, U.S.M.J.

TRANSCRIPT ORDERED BY:

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(On next page)

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1 THE COURT: Good morning. How are you, folks?

2 UNIDENTIFIED SPEAKER: Good morning.

3 UNIDENTIFIED SPEAKER: Good morning, Judge.

4 UNIDENTIFIED SPEAKER: Good morning, Your Honor.

5 THE COURT: And we're on the record to discuss the  
6 outstanding discovery issues that I have in the letters lined  
7 up for me beginning June 17th. Let me ask you if you had any  
8 conversation and if there's been any resolution of any of these  
9 issues or if I should just go through each of the  
10 interrogatories that were raised in the June 17th letter?

11 MR. NOVACK: Judge, this is David Novack from Budd  
12 Larner for Excellium. And we're, I guess, the target of that  
13 letter. We have not had a further discussion with our  
14 adversary. However, we continue to make progress on reviewing  
15 and producing documents. We have retained, or re-retained I  
16 should say, accompany to copy and review our electronic  
17 documents. We have more hard copy documents to produce and  
18 we're making progress.

19 THE COURT: Okay. What is the targeted date for when  
20 you'll be complete with your disclosures, do you know?

21 MR. NOVACK: I don't know. The -- there was a  
22 problem in copying -- originally in copying one of the hard  
23 drives due a power failure at the facility. That's being  
24 redone. And after they have that hard drive, we should have a  
25 better idea as to the scope of the project of reviewing the

1 documents to mark confidential, privileged and relevant  
2 documents. The hard copies that we have should be ready to  
3 produce by the beginning of next week.

4 THE COURT: Okay. All right. Anything from  
5 plaintiffs before we go through this?

6 MR. MILLER: Your Honor, this is Greg Miller. I'll  
7 let Nishan Kottahachchi take most of this. But the one  
8 question I have and issue I want to raise is, with respect to  
9 Excellium now indicating that it's going to be producing  
10 documents. It's still unclear to us whether those documents  
11 and other information are responsive to what they term to be  
12 non-objectionable requests or whether or not they've changed  
13 their position with respect to the issues laid out in our  
14 letters to you. So I think we need some clarification there to  
15 understand where everything --

16 THE COURT: Okay. Well, I think that's where I can  
17 help regardless of what Mr. Novack's client's position is. I  
18 did go through each of the items that is contained in -- are  
19 contained in the June 17th letter. And painting with a broad  
20 brush, it's clear from reading the complaint that the  
21 allegations here are all focused on the advertising, marketing  
22 and promotion of this product. So anything that is in any of  
23 the defendant's control that relates to the marketing of the  
24 product. And I think document request Number 38 just talks  
25 also about safety, efficacy, substitutability and FDA approval

1 status. I mean, that's obviously what the plaintiff's main  
2 concern is. But any of that type of information that's in any  
3 documents that are within the defendant's control or generated  
4 by the defendant, whether it's labeling material, whether it's  
5 correspondence that discusses how to market this material,  
6 whether it's correspondence that talks about a relationship  
7 with anyone else in terms of advertising. For example, those  
8 other parties that are mentioned. I guess the wholesaler,  
9 ordering system folks, any of that type of information should  
10 be produced. So I would narrow, for example, document request  
11 Number 14 where it asks for communication with these  
12 wholesalers to simply -- any communications with wholesalers  
13 that relate to the marketing of the product. And, for example,  
14 if it talks about safety, efficacy, the substitutability and  
15 the FDA approval status. That's, again, me painting with a  
16 broad brush.

17           Going through all of these, I would tell you that the  
18 only limitations I would really put on any of these would be,  
19 as I said, Number 14, that it just needs to be narrowed to talk  
20 about marketing. I don't see the -- I don't see the relevance  
21 of the information that you're seeking regarding medicaid and  
22 medicare unless, again, we're talking about in your  
23 communication with any of those government insurance programs  
24 if there is information in those communications that relates to  
25 the marketing of the product.

1           Stepping back to Number 27 for a minute. I guess to  
2           the extent that the corporate structure is an issue, it seems  
3           to me that in your responses -- in defendant's responses to  
4           Rule -- in your Rule 26 disclosures and in your responses you  
5           should be identifying anyone who is involved in the marketing  
6           advertising. So while that's listed as a document request, if  
7           it isn't covered in an interrogatory, I would suggest that you  
8           answer that specifically and that would alleviate your having  
9           to produce the whole corporate structure. And the only other  
10          question I really had was Number 17. Was there an agreement as  
11          to the time period?

12                 UNIDENTIFIED SPEAKER: Judge, there's -- I think that  
13          there was. And there's some tension there because of what's  
14          really relevant in this case. You know, we're going back  
15          through -- we're not a big company, we're not computerized,  
16          we're going through hard copy documents. Frankly, we've come  
17          to a negotiation but we frankly just still don't understand  
18          what relevance any of our advertising had prior to the July 30,  
19          2009 approval date. You know, maybe that's just my inability  
20          to understand the plaintiff's case.

21                 MR. KOTTAHACHCHI: Your Honor, this is Nishan  
22          Kottahachchi for the plaintiffs. As counsel for Excellium  
23          noted, there was an agreement as a result of two confirmed  
24          meetings that resulted in the July 29, 2006 time limitation.  
25          The reason that date is relevant is that's three years before

1 the date of approval of plaintiff's product. We used three  
2 years of the date to go back because a lot of the information  
3 that was provided to the price list and wholesalers, it's our  
4 understanding, was done before that date. Before the FDA  
5 approval. And in order to find out what was said about these  
6 products, which eventually got onto the price list and  
7 wholesale ordering systems, we need to go back some date before  
8 2006. We thought three years was reasonable. We initially  
9 went with five years date, but then -- five years before but  
10 then initially withdrew it to three years. We think that's a  
11 reasonable time limitation and is necessary to find out -- get  
12 the documents and the information that is at the heart of this  
13 litigation.

14 THE COURT: Well, Mr. Novack, I don't want to touch  
15 an agreement if you had one.

16 MR. NOVACK: Judge, I would concede that -- what  
17 Nishan said is accurate. And, you know, we're working on it.

18 THE COURT: Okay.

19 MR. NOVACK: We're basically doing a page by page  
20 review of the client's documents. Frankly searching for a  
21 needle in the haystack because while -- you know, from an  
22 objective point of view one would think that there was  
23 significant correspondence regarding this drug with these  
24 selling procedures. There isn't.

25 THE COURT: Well, I understand from your papers that

1       it sounded to me anyway that your client does not market in a  
2       way that you are, I guess, the stereotypical view of marketing.  
3       That you have these price lists and that you go to trade shows  
4       but with the price list and you're not doing an out and out  
5       advertisement campaign. That's what it sounded like to me from  
6       your papers.

7               MR. NOVACK: Judge, I don't want to be a witness in  
8       this case, but I have been involved in this industry for quite  
9       some time. And the way that people in my client's situation,  
10      basically the generic drug industry, they sell based on price  
11      only. They don't advertise, they don't promote their products  
12      as you suggested in the traditional marketing campaign. They  
13      don't do those -- they don't participate in those kinds of  
14      activities.

15             THE COURT: Is most of the material --

16             MR. NOVACK: We're not looking for, you know, an  
17      advertising campaign with our marketing agents or anything like  
18      that. Those documents don't exist.

19             THE COURT: Is most of the information that you're  
20      searching through, Mr. Novack, on a computer where you can do  
21      term searches?

22             MR. NOVACK: Well, that's -- that is the information.  
23      Some of it is, some of it is hard documents. The information  
24      that I indicated earlier that were getting copied off of the  
25      various hard drives at the company, that will be put into a

1       searchable format.

2               THE COURT:   Okay.

3               MR. NOVACK:   And so that we would expect to identify  
4       communications with the price list and wholesalers.   And we'll  
5       be producing that.

6               THE COURT:   Okay.

7               MR. NOVACK:   Such as it is.

8               THE COURT:   All right.   So is there any question  
9       about where I'm going with all of these -- the issues that  
10       you've raised?   Again, I know I have spoken by painting with a  
11       broad brush, but I think that what I've stated could be applied  
12       to each of these fairly easily with the caveats or  
13       clarifications or limitations that I mentioned as to those  
14       specific items.   Does that work for everyone?

15              MR. NOVACK:   I think it does work for us, Judge.

16              THE COURT:   Okay.

17              MR. NOVACK:   Novack again.

18              THE COURT:   And what I'd like to do is, and I don't  
19       mean to torture you folks, but I'm trying to balance, keeping  
20       you moving, but also recognizing that there is some problem  
21       that the defendants are having in their document production.  
22       So what I'd like to get, in particular from you, Mr. Novack, is  
23       an update as to where we are with the production of all of  
24       these items by mid-August.   And then I can, perhaps in less of  
25       a vacuum, address the schedule issue that we have.   I know we

1 have an end date in September for fact discovery. That there's  
2 been a request to extend that by 60 to 90 days. The plaintiffs  
3 somewhat reluctantly have agreed that they understand that  
4 perhaps a 60 day extension might be necessary. But I somewhat  
5 like to hold everyone's feet to the fire and get an update on  
6 documentation production the middle of next month. And then I  
7 can go from there and perhaps give an extension based on what I  
8 see or address any additional problems with the delay so that  
9 hopefully the next extension I give is the last. And you folks  
10 are certainly free to start scheduling depositions in September  
11 if you'd like knowing -- you know, September, October, November  
12 knowing that I will give you at least the 60 days that sounds  
13 reasonable. But I don't want to be in a position where we all  
14 put this on the back burner because we now have a little bit of  
15 breathing room. So again, coming full circle, if I can just  
16 get an update whether it's a joint letter, whether it's easier  
17 just for everyone to send me an individual letter saying this  
18 is where we are and we think, in light of where we are, that  
19 the 60 days would be ample time to wrap everything up. And if  
20 I can have that letter by August 20th, that would be great.

21 UNIDENTIFIED SPEAKER: Okay.

22 THE COURT: Okay? So we have an understanding that I  
23 will be giving you an extension in the discovery schedule, I'm  
24 just not entering it yet because I want to take your pulse on  
25 all of this and make sure that what we do next makes perfect

1 sense. And also if I have to get your attention before the  
2 summer's over then I can get you folks back on the phone and  
3 perhaps nudge someone not so gently. Good?

4 MS. BRAGMAN: Your Honor, Karen Bragman on behalf of  
5 defendant West-Ward. I have one question about the scheduling  
6 order.

7 THE COURT: Sure.

8 MS. BRAGMAN: That is, can we assume that all of the  
9 other dates --

10 THE COURT: Oh, yes.

11 MS. BRAGMAN: -- the critical dates in the scheduling  
12 order would be moved with the same amount of time?

13 THE COURT: Yes. Yes. You can assume that.

14 MS. BRAGMAN: Very good. Whatever the extension is,  
15 the other dates would move accordingly?

16 THE COURT: Yes. That's right. Okay.

17 MR. KOTTAHACHCHI: Your Honor, this is Nishan  
18 Kottahachchi for the plaintiff. Generally what you said in  
19 terms of the broad strokes the discovery is acceptable to the  
20 plaintiffs. You know, we would ask that the mid-August update  
21 is also fine with the plaintiffs, you know, given that the  
22 discovery requests were served in October of 2009. We would  
23 hope that the production would be made in another month. If  
24 that's not possible, for technical reasons, of course we  
25 understand. The one issue that was left outstanding here is

1 the interrogatory responses. Numbers 5, 6 and 11. That, we  
2 believe, could be answered well before mid-August. And we'd  
3 hope that would be done so.

4 THE COURT: Okay. Let me just --

5 MR. NOVACK: This is Mr. Novack again. We certainly  
6 don't expect to wait until mid-August to drop all of our  
7 discovery responses on the plaintiff. As soon as they're  
8 ready, we'll serve them.

9 THE COURT: Okay. That would be perfect. To the  
10 extent you have to --

11 MR. NOVACK: To do that with the documents.

12 THE COURT: And to the extent, Mr. Novack, that --  
13 for some reason you need to review documents before you get  
14 your responses out, I just suggest you do the answers even if  
15 it's on a rolling production basis. While it might not be the  
16 most efficient it would hopefully keep the progress moving and  
17 the plaintiff satisfied as well that they're getting this  
18 information as you have it.

19 MR. NOVACK: Absolutely, Judge.

20 THE COURT: All right.

21 MR. NOVACK: We will following that instruction.

22 THE COURT: Okay. The last thing, and I don't know  
23 if it will come up for any of you, but if you do have a  
24 situation where you don't have certain material, and this is  
25 all you have, if you can just get a certification to that

1 extent as well then that often alleviates folks having to come  
2 to me. And I know the receiving party is often a little leery  
3 of getting a note or a letter that simply says this is all we  
4 have. And if you can just do a certification to that extent,  
5 it doesn't exist, we don't do this, it's not our practice or,  
6 you know, these are all the documents that we have relating to  
7 this then hand over the certification at the same time and  
8 hopefully you won't have to engage in a writing campaign then.

9 MR. NOVACK: Okay.

10 THE COURT: Okay. So we're going to be a little bit  
11 fluid after -- my game plan is that after I get this August  
12 20th submission that I can hopefully pretty quickly either get  
13 you folks on the phone if there's something to talk about, or  
14 simply enter a schedule extending the dates and I will plug in  
15 a telephone conference along the way. And generally I do that  
16 before fact discovery is set to close so I can make sure that  
17 we don't have any loose ends. So that's sort of the method to  
18 my madness. And if you folks have a suggestion for something  
19 different along the way, let me know. I know that these cases  
20 are often difficult to settle, but if sometime between now and  
21 when we're next scheduled to speak someone wants to raise the  
22 idea of coming in and sitting around the table with me, going  
23 to a mediator, I am open to any suggestions. And just because  
24 I'm not constantly raising it doesn't mean that I wouldn't  
25 entertain any suggestion that might get you to go away.

1 MR. MILLER: Your Honor, this is Greg Miller on  
2 behalf of plaintiff. Just one last question.

3 THE COURT: Sure.

4 MR. MILLER: Does the Court have a preference as to  
5 whether what we've discussed today should be memorialized in an  
6 order or is that something that the Court doesn't deem --

7 THE COURT: Well, I actually am on the record. And I  
8 sort of mentioned that at the beginning, so I sort of figured  
9 we have this as a record of --

10 MR. MILLER: Okay.

11 THE COURT: -- and then this way no one has to go  
12 through the process of memorializing it officially. So if you  
13 need a copy of this, you can certainly ask for the transcript  
14 or if you want to wait to see if we have any issues down the  
15 line we can always get it at that point. Good?

16 MR. MILLER: That sounds fine. Thank you.

17 THE COURT: Okay. All right, folks. Well, enjoy the  
18 rest of the summer. Hopefully I won't have to talk to you and  
19 that the production will go smoothly and I can just plug in a  
20 conference call for us in early fall. But if you need me, you  
21 know how to get me.

22 MR. MILLER: We appreciate it, Your Honor.

23 THE COURT: All right.

24 UNIDENTIFIED SPEAKER: Enjoy the summer.

25 THE COURT: Bye-bye.

(Conclusion)

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C E R T I F I C A T I O N

I, GINA M. CERMAK, the assigned transcriber, do hereby certify that the foregoing transcript of the proceedings before the United States District Court, District of New Jersey, on July 14, 2010, 10:38 a.m. to 10:50 a.m., is prepared in full compliance with the current transcription format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings to the best of my knowledge and ability.

S/ Gina M. Cermak

November 15, 2010

GINA M. CERMAK

Date

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